BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Application of SBC Communications Inc.,	)	
Southwestern Bell Telephone Company,	)	CC Docket No. 00-65
And Southwestern Bell Communications	)	
Services, Inc. d/b/a Southwestern Bell Long	)	
Distance for Provision of In-Region	)	
InterLATA Services in Texas	)	

SUPPLEMENTAL JOINT REPLY DECLARATION
OF SARAH DeYOUNG AND MARK VAN DE WATER

INTRODUCTION AND SUMMARY

1. My name is Sarah DeYoung. I am the same Sarah DeYoung who previously submitted to the Commission a Declaration on UNE-Loop hot cut processes that was filed by AT&T on January 31, 2000, a Reply Declaration that was filed by AT&T on February 22, 2000, a Supplemental Joint Declaration with Mark Van de Water ("DeYoung/Van de Water Decl.") that was filed by AT&T on April 26, 2000. I also attested to the accuracy of the facts in AT&T's March 6, 2000 Ex Parte on UNE-Loop issues, and personally reviewed and assisted in the preparation of AT&T's hot cut ex partes of March 13 and March 30, 2000. My full qualifications are set forth at length in my initial declaration.

2. My name is Mark Van de Water. I am the same Mark Van de Water who previously submitted to the Commission the DeYoung/Van de Water Supplemental Declaration, and I participated in preparing the reconciled data that was submitted to the TPUC and was included as Attachment 8 to the initial DeYoung UNE-Loop Declaration and as Attachment C to

the DeYoung/Van de Water Supplemental Declaration. My full qualifications are set forth in more detail in the DeYoung/Van de Water Supplemental Declaration.

3. Since filing the DeYoung/Van de Water Supplemental Declaration, we have reviewed additional available evidence concerning AT&T and SWBT's ordering and provisioning of hot cut loops for March, April, and May 2000, including outage data for AT&T's orders in the April 21 and April 25, 2000 ex parte submissions to the Commission from SWBT, the April 26, 2000 Evaluation of the Texas Public Utility Commission ("TPUC"), and the May 8, 2000 SWBT Brief on Benchmarks to the TPUC. Mark Van de Water personally participated in reconciling AT&T and SWBT data in numerous telephone conversations with SWBT personnel during the week of May 9, 2000.

4. Our prior declarations detailed the facts demonstrating SWBT's failure to provide nondiscriminatory access to hot cuts, whether through the FDT or CHC process, and thus its failure to meet the criteria for minimally acceptable hot cut provisioning that the Commission set forth in the Bell Atlantic-New York Order.[1] In those declarations we also explained that this failure reflects fundamental problems with SWBT's provisioning processes, its data collection, and its data reporting.

5. In Part I of this Supplemental Reply Declaration, we assess whether the recent TPUC evaluation or SWBT's recent ex partes have added to the record any evidence that supports SWBT's claim to be offering nondiscriminatory access to hot cut loops. We discuss in particular the SWBT's unilateral "refinements" to the once mutually agreed to data, and show

[1] In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-285 (rel. Dec. 22, 1999)(hereafter "BA-NY Order").

that these "refinements" produce only a one-sided and incomplete picture of SWBT's performance.

6. In Part II, we then review the proposals for revised Performance Measures, as well as SWBT's responses to the action items put forward as a result of the learnings from the recent reconciliation experience. The partial and limited responses of the TPUC and SWBT do not fully address the problems identified in SWBT's past performance, and do not provide any assurance of future behavior in compliance with the requirements of Section 271.

I. NEITHER THE TPUC EVALUATION NOR THE ADDITIONAL MATERIAL SWBT SEEKS TO ADD TO THE RECORD OFFER ANY SUPPORT FOR SWBT'S CLAIM TO BE PROVISIONING UNE LOOP HOT CUTS CONSISTENT WITH ITS SECTION 271 OBLIGATIONS.

7. As AT&T has previously noted, in order for SWBT to meet its Section 271 obligations, SWBT must provide AT&T and other CLECs with nondiscriminatory access to unbundled loops. See Section 271 (c)(2)(B)(ii) and (iv) and Section 251(c)(3). If AT&T and other CLECs are to have a meaningful opportunity to compete for these customers, SWBT needs to provide CLECs with the best level of hot cut provisioning performance that it is technically and commercially feasible for SWBT to achieve, so that no more customers than is necessary suffer service disruptions as the price of selecting an new telecommunications provider. At the very least, under the BA-NY Order, SWBT must demonstrate each of the following: (1) orders cutover on-time 90 percent of the time or more; (2) BOC-caused service outages on 5 percent or less of orders; and (3) fewer than 2 percent of loops requiring trouble reports within 7 days. See BANY Order, ¶309.

8. As set forth in our prior Supplemental Declaration, the evidence shows that, for the December-February period on which SWBT now relies, SWBT cannot demonstrate compliance with any of these requirements. Specifically, during the December through February

period, SWBT caused an outage on 16.7 percent of AT&T hot cut orders, with the average duration for reconciled outages for December through February for FDT was 8.42 hours, and for CHC was 6.49 hours. See UNE-Loop Decl., ¶30.

9. The data manipulations of SWBT and the TPUC notwithstanding, SWBT still has not demonstrated and cannot demonstrate compliance with the minimally acceptable standards of Section 271 as set forth in the BA-NY Order. Most critically, nothing can remedy the critical absence of any measure or indicator of the number of service outages. No Performance Measure captures defective cuts, and SWBT's self-reported data on PM 114 and 114.1, intended to capture premature or prolonged cutovers respectively, have been consistently unreliable. See DeYoung/Van de Water Supp. Decl., ¶¶18, 29-31, 86; DeYoung UNE-Loop Decl., ¶208 et seq. ("UNE-Loop Decl."); DeYoung Reply Decl., ¶56 et seq. ("Reply Decl."); AT&T 3/6 Hot Cut Ex Parte; pp.2-3.

10. The temporary expedient of data reconciliation has provided some insight on the scope of SWBT's provisioning problems.[2] It has generated jointly agreed-to data on AT&T's orders for outages, premature disconnects, and prolonged cutovers that enable the Commission to compare SWBT's performance directly with Bell Atlantic's using data whose accuracy is unquestioned by any party. In addition, AT&T, using SWBT's raw data, calculated trouble reports on a seven-day basis that is fully consistent with the BA-NY Order standards. SWBT and the TPUC now are seeking to have this Commission ignore this directly applicable data in favor of data that is not comparable to what was considered in the BA-NY Order, and that does not represent the mutually agreed conclusions reached by the parties in the reconciliation process.

[2] Temporary because reconciliation is too resource-intensive to be routinely conducted on a competitively significant volume of orders. See DeYoung/ Van de Water Supp. Decl., ¶77.

11. The data for March shows that SWBT remains out of compliance. The overall outage rate for orders is 6.1 percent, with 5.8 percent of CHC orders suffering outages, along with 10.0 percent of the relatively few FDT outages.[3] See Outages Summary, March 2000 Data (Attachment 1 hereto).[4] These figures do not include X orders (for a total of X lines) which were left in "Bucket 26" and not treated as outages because SWBT had no records on those orders. As can be seen from the records in Attachments 3, AT&T's information on those orders was quite detailed, and every bit as good as on Bucket 26 orders which were moved into SWBT-caused outage categories. See Bucket 4 and 14 Notes (Attachment 4 hereto). To leave these orders in Bucket 26 under such circumstances amounts to a reward to SWBT for failing to keep proper records. If these orders were included in the outage calculation, the overall outage rate would be 7.9 percent for orders, and the CHC order outage rate would be 7.7 percent.[5] SWBT is thus still far from meeting the standards required to show compliance with its 271 obligations.

A. The Outage Data Demonstrates That SWBT Is Not In Compliance, Despite The Attempt By SWBT And The TPUC To Direct Attention Away From The Reconciled Data Mutually Agreed To By SWBT and AT&T.

12. After AT&T and SWBT engaged in the laborious and resource intensive process of reconciling the data on unexpected service outages during cutovers, as well as on Performance Measures 114 (premature disconnects) and 114.1 (prolonged cutovers), SWBT filed with the

[3] On a line-basis, the overall outage rate was 7.6 percent, with 7.0 percent for CHC and 13.6 percent for FDT.

[4] These calculations are based on a denominator of total orders for the month provided by SWBT and filed by them with the TPUC. There was not sufficient time to reconcile this data between AT&T and SWBT, given the filing deadline for this submission. In addition, SWBT has acknowledged that it has a problem with data being lost between the workforce administration database ("WFA") and its raw data, and has said they are going to be making changes in data collection and reporting to correct this. See SWBT Response to AT&T Action Items, p.4 (Attachment 2 hereto). Given that, it is unclear whether denominator reconciliation would be appropriate at this time.

[5] On a line-basis, the overall outage rate would be 8.9 percent, and the CHC rate would be 8.4 percent. (The FDT rate would remain unchanged.)

TPUC and the Commission a unilateral "refinement" of the same data. The next day, the TPUC filed an evaluation of SWBT's performance that relied on this unilateral SWBT "refinement" to conclude that SWBT was in compliance with this Commission's minimum standards.

13. Prior to this submission, the TPUC did not provide AT&T an opportunity to comment on SWBT's "refinements." The TPUC also did not ask AT&T whether it had any "refinements" or other comments to make on the reconciled data. If AT&T's input had been solicited by the TPUC, it would have suggested refining the PPIG's outage definition to be more genuinely and readily comparable to that in the BA-NY Order by including provisioning problems captured as trouble reports. See Section I.A.2.e. infra. Because these outages had been excluded by the PPIG but included in the BA-NY Order, even the reconciled PPIG data understates the number of outages which should be attributed to SWBT when evaluating whether it is meeting the minimally acceptable standards for showing nondiscriminatory hot cuts provisioning.

14. Because the TPUC relied exclusively on SWBT's one-sided data manipulation, its comments reflect all the flaws of its source. As we show below, SWBT's refinement contains assumptions and biases that misrepresent the record, skew the data, and confuse any assessment of SWBT's performance.[6]

15. Furthermore, the TPUC never engaged in any independent inquiry, unlike the New York Public Service Commission ("NYPSC") in the case of the Bell Atlantic application. See Affidavit of Margaret D. Rubino, ¶¶ 12-13, NYPSC Exhibit 2 to Evaluation of the New York Public Service Commission — Reply (11/5/99) ("Rubino Aff.") (Attachment 5 hereto). As

[6] We also note that the data relied on by the TPUC are either the data that AT&T and other CLECs reconciled with SWBT, or data self-reported by SWBT. At no point did the TPUC intervene, as did the New York PSC, to resolve disputes over the data and report its own independent findings.

such, the TPUC's evaluation is deserving of no particular deference; the Commission can read and interpret the materials as well as the TPUC. Rather than repeat the TPUC's error in relying on SWBT's one-sided and self-interested materials, the Commission should critically review SWBT's assumptions, data manipulations, and misrepresentations of the record. Stripped of these assumptions, manipulations, and misrepresentations, the record cannot support SWBT's claim of 271 compliance.

16. Significant anticompetitive consequences would follow if the Commission were announce a relaxed minimum standard for hot cut outages, as the TPUC now requests. According to the DOJ's BA-NY evaluation, surveys indicate that "'[t]he strongest impediment to switching [LECs] comes from concern about service interruptions during changeover.'"[7] AT&T's own experience is fully consistent with that observation. See Declaration of Robert Dapkiewicz. Thus, this Commission was right to conclude that any evidence that a BOC was suggesting to consumers that there was even "a possibility of service disruption" would itself be competitively significant. BA-NY Order ¶ 309.

17. The Commission's minimum standard for outages was still rather generous. AT&T believes that the small to medium size business market in Texas could support AT&T orders at a volume of XXX orders per day. Under the minimum standard as articulated in the BA-NY Order, SWBT could cause outages on up to 5 percent of AT&T's customers, meaning XX AT&T customers each day, or about XXX outages per month for AT&T customers alone. The bad press and word-of-mouth that would accompany that widespread degree of service outages, along with the chilling effect of such publicity on the willingness of customers to switch carriers, and the damage to AT&T's reputation as a carrier that provides the highest quality of

[7] DOJ NY Eval. 18 n.39 (quoting Competition Policy Institute Comments, Att. A, at 11).

telecommunications service, would be severe. Enforcement of the Commission's minimum standard would produce an unacceptably high number of outages, and would by itself preclude meaningful competition using unbundled hot cut loops.[8]

18. If the Commission were to dilute the outage standard further, CLECs would be effectively precluded from using unbundled hot cut loops in any significant volumes. The TPUC has provided here no factual basis to support such a dilution, and there is none. For example, the outage duration in Texas is just as much a problem and in New York, with the *average* duration of SWBT's CHC outages (beyond the 1 hour of outage time already permitted SWBT in the cutover process) lasting 6.49 hours, and the average duration of its FDT outages lasting 8.42 hours, meaning AT&T's new customers suffering outages are out of service for an entire business day. DeYoung/Van de Water Supp. Decl., ¶ 30.

19. Nor are Texas customers are more forgiving of service outages when they switch carriers than New York customers, and there is no reason to think Texas businesses suffer from such outages any less. From AT&T's experience, SWBT-caused service outages have resulted in lost business opportunities and lost revenue for the business customers who suffer from them. Thus, there is no factual basis for concluding that competition will thrive in Texas with a level of service outages that the Commission found unacceptable in New York.

20. The various adjustments and "refinements" the TPUC made to bring the reconciled outage rate down from 16.7 percent to 1.68 percent must be carefully scrutinized. They are methodological adjustment, not based on any new factual findings, and would

[8] For that reason, AT&T has urged the Commission to set a hot cut standard that requires ILECs to achieve the fewest number of hot cuts that is technically feasible and commercially reasonable, a standard that is truly "a proxy for whether access is being provided in substantially the same time and manner and, thus, [is] nondiscriminatory." BA-NY Order ¶ 45; see AT&T Comments at 28 n.34.

effectively weak the outage standard adopted in the BA-NY Order. None should be followed here.

1. The SWBT/TPUC Exclusive Focus On CHC Is Misplaced.

21. Since July 1999, SWBT has repeatedly encouraged AT&T and other CLECs to use the FDT process for most hot cut orders. CLECs responded to SWBT's encouragement by, inter alia, submitting more FDT orders than CHC orders during the December – February period on which SWBT and the TPUC now rely for assessing SWBT's hot cut performance. Nevertheless, SWBT's performance on FDT was poor. The reconciled data show that SWBT caused outages on 20.8% of AT&T's FDT orders alone, and on 16.7% of all of AT&T's hot cut orders (FDT and CHC combined). This performance is obviously far worse than Bell Atlantic's.

22. The TPUC recommends, however, that the FCC overlook SWBT's admittedly inadequate performance on FDT orders. In its view, only SWBT's provisioning of CHC orders should matter. None of its explanations for dismissing SWBT's poor FDT performance is valid.

23. First, the TPUC claims (p. 14) that "the CHC process has been in effect for a long period of time; FDT by contrast is a new process." Although it is true that FDT is "newer" than CHC, FDT is not so new as to warrant a free pass from regulatory scrutiny. Rather, SWBT has consistently promoted FDT as the preferred process for provisioning most hot cut orders, and FDT has been heavily used throughout the period most relevant to this application.

24. Specifically, SWBT first wrote to AT&T to "encourage" use of FDT in July 1999, claiming that FDT would help address problems that AT&T had with CHC orders. See UNE-Loop Decl., ¶ 45 & Att. 2. AT&T and SWBT then conducted a trial of the FDT process last August – 8 months before the second Texas application. Thereafter, in both written and oral communications and at TPUC hearings in the fall, SWBT repeated its recommendation that CLECs use FDT instead of CHC. See DeYoung UNE-Loop Decl., ¶44-47.

25. SWBT has written AT&T to "encourage" its use of the FDT process because it allowed "AT&T to determine the cut time and requires no coordination."[9] Similarly, SWBT has acknowledged that "with increasing demands for Coordinated Hot Cuts (CHC), it is becoming difficult to meet the requested FDT" and suggested that AT&T employ the FDT process instead.[10] As SWBT's Mr. Royer has testified, because "the coordinated hot cut process is very manual on both sides", SWBT had proposed using the FDT process since it "is a much less resource intensive process [and] is one way that we can mitigate this congestion that is involved in the coordinated hot cut issue because it doesn't require the manual hand holding that the coordinated hot cut does."[11] SWBT has acknowledged that, were AT&T to double the current CHC order volume, not only may SWBT not be able to provision at the desired frame due time, it may not even be able to provision on the requested cut date because of capacity constraints affecting SWBT's CHC procedure.[12] SWBT, however, has confidently predicted to AT&T that "if you go to frame due time it alleviates" the CHC capacity constraints.[13]

26. As SWBT itself has told the Commission:

> *SWBT recommends the use of the CHC process when 20 or more UNE loops are to be converted at a single end user's address or the conversion is to be worked with a DFDT outside normal*

[9] See July 6, 1999 letter of SWBT's Mr. Hughes to Ms. DeYoung, at 1 (see UNE-Loop Decl., Attachment 2). SWBT has similarly encouraged other CLECs to use the FDT process. See Statement of Gwent Rowling (ICG), TPUC 11/2/1999 Hearing (Attachment 6 hereto).

[10] See Email dated September 20, 1999 from SWBT's Mr. Royer to Ms. DeYoung (see UNE-Loop Decl., Attachment 4).

[11] Testimony of SWBT's Mr. Royer, Nov. 2, 1999 TPUC Hearing Tr. at 171 [SWBT App. C at Tab 1968].

[12] As discussed in ¶71 infra, AT&T's experience last year and again this month demonstrates that these capacity constraints are quite real, even at current volumes.

[13] Statement of SWBT's Tom Hughes, TPUC Docket No. 21000, Sept. 21, 1999 Workshop ("Sept. 21 Dispute Workshop"), Tr. at 52 (see UNE-Loop Decl., Attachment 5).

> *business hours.* The CHC process is normally necessary only for larger size business customers where the amount of existing competition is much greater. *FDT should be used for small businesses and residence end users.*

Conway Aff., ¶79 (emphasis added).

27. SWBT also provided CLECs an additional and significant financial incentive to use FDT by proposing to levy significant surcharges in the future for the additional manual coordination on a CHC cut. Specifically, SWBT announced last year in an Accessible Letter that it will charge CLECs $115 for each CHC line in addition to the charges that would apply if FDT were used instead. See SWBT CLEC Handbook, "Unbundled Loop" at § 1.4.7 [https://clec.sbc.com/clechb/ restr/clechb/main]; see also SWBT's FCC Access Tariff No. 73 (Attachment 7 hereto).[14] Although SWBT is not currently charging this fee, it could do so at any time in the future.[15] CLECs have every reason to think that SWBT will do so as soon as SWBT receives 271 relief, if not before. For example, SWBT's affiliate in California, Pacific Bell, despite vehement and longstanding protests by CLECs, today is charging CLECs a similar labor charge that equates to an average of $50 per loop and a non-flow-through service order charge of $35 for each CHC order, above and beyond the costs of FDT. The Texas charge, which is based on SWBT's FCC Access Tariff No. 73, has never been approved by the TPUC nor supported by an appropriate cost study based on TELRIC methodology.

[14] The fee, which is supposedly intended to compensate SWBT for its staff time, is set at $0 for the first half-hour and $115 for each subsequent half-hour -- and, because SWBT is allowed one hour to complete the cutover, the fee will likely prove to be at least $115. See SWBT's CLEC Handbook, "Unbundled Loop" at § 1.4.7 [https://clec.sbc.com/clechb/ restr/clechb/main]. As noted, SWBT has not yet assessed the fee against AT&T in connection with its CHC hot cut orders, but its handbook makes clear that intends to impose the fee.

[15] SWBT could even seek to charge this fee retroactively.

28. This $115 supplementary surcharge for each CHC order creates a substantial financial incentive *not* to use CHC for orders of fewer than 20 loops. Existing non-recurring charges for hot cuts include XXX for the loop non-recurring charge, XXX for remote testing access,[16] and XXX for the service order charge. At current retail rates, it takes AT&T about XXX to recover these costs. An additional $115 dollars per line per half hour would greatly outweigh the existing cost elements, and a single $115 charge would extend the cost recovery period to XXX . Indeed, if competing CLECs used FDT and AT&T did not, AT&T would face a considerable cost disadvantage.[17]

29. Moreover, it is crystal clear from the way SWBT structured the CHC charge that SWBT *intended* the charge to function as a disincentive to use CHC on orders of 20 or fewer loops. Notably, SWBT does *not* levy this $115 charge on CHC orders for 20 or more loops. See Accessible Letter (Attachment 8 hereto). In other words, there is no CHC surcharge for orders that SWBT deems are appropriate for the CHC process. The charge is levied *only* on orders for fewer than 20 loops, which SWBT thinks should be submitted as FDT orders. See id. Thus, SWBT's cost structure for CHC and FDT creates an unequivocal and strong incentive for CLECs to use FDT for nearly all hot cut orders.

30. As a result of SWBT's consistent encouragement and financial incentives, AT&T and CLECs began switching from CHC to FDT toward the end of 1999. As noted above, CLECs (including AT&T) sent more FDT than CHC orders to SWBT during the December-to-

[16] AT&T is paying this fee under protest. See UNE-Loop Decl., ¶¶38-39.

[17] The charge also creates an incentive for SWBT to make the cutover of each line take longer than it should, thus functioning as a reward for being inefficient. Under the interim performance measure penalties, SWBT must pay $150 for each violation of the TPUC cutover interval standard, but that interval is set at 2 hours, so SWBT would get rewarded for every line that takes longer than half an hour but less than two hours to complete.

February period. As provisioning problems arose with FDT, SWBT repeatedly promised that they would be fixed. For example, in the aftermath of SWBT's recent provisioning difficulties with FDT, which were particularly acute in February, CLECs inquired whether SWBT still endorsed FDT as the principal process to use for typical hot cut orders. SWBT unequivocally confirmed its endorsement of FDT. On April 6, SWBT confirmed to CLECs, at a CLEC user forum, that FDT is "the way to go." See April 10, 2000 Letter from Sarah DeYoung to David E. Young (Attachment E to DeYoung/Van de Water Supp. Decl.) AT&T then wrote to SWBT to determine if this really was SWBT's position. SWBT wrote back and confirmed that it was, stating: "[I]n Texas, our FDT process appears to be stable. . . . I would encourage your use of the FDT process." See DeYoung/Van De Water Supp. Aff. ¶ 23 n. 9 and Att. D. Thus, SWBT has consistently represented to CLECs that they should use FDT for most hot cut orders, and CLECs have responded by shifting most of their orders over to FDT during the period on which SWBT now relies. For purposes of this application, then, FDT is certainly not "new."

31. Second, the TPUC states (p.14) that FDT should be disregarded because Bell Atlantic did not offer FDT in New York at the time of its application and because the FCC did not evaluate an FDT process there. In reality, the process used by Bell Atlantic in New York was neither FDT nor CHC, as those terms are defined and used in Texas, but something of a hybrid. The materials filed in the Bell Atlantic New York application indicate the process used there called for a degree of coordination, as in SWBT's CHC process, but in practice the process was also similar to what SWBT (and its SBC affiliates) call FDT. See Meek Aff., ¶55-58 (Attachment 9 hereto). Unlike SWBT's CHC process in Texas, in New York, it was the ILEC that was supposed to call the CLEC to confirm the cutover, and that call was supposed to be one hour before the frame due time; this was called the Due-Date minus one-hour (DD-1 hour) call.

Id. at ¶55. Because Bell Atlantic frequently did not make this call, AT&T initiated a daily conference call with Bell Atlantic to review all orders scheduled to be cut the following day, but it turned out that Bell Atlantic participated in this call only about half the time. Id. at ¶58. Lacking any coordinating phone call, the process in practice often proceeded more like SWBT's FDT process than its CHC process.

32. Furthermore, whether Bell Atlantic had an FDT process is ultimately beside the point. Here, not only has SWBT chosen to offer two provisioning processes but, as described above, SWBT has affirmatively encouraged CLECs to use the FDT process and not CHC for the majority of their orders. The notion that FDT is somehow an afterthought, that CLECs may or may not use as they wish, is a rationalization that SWBT developed after-the-fact to excuse its poor performance.[18] In these circumstances, to fail to give proportionate weight to SWBT's performance on FDT orders would be manifestly arbitrary. It would be tantamount to permitting SWBT to get away with a regulatory bait and switch, in which SWBT is effectively allowed to steer CLECs away from the provisioning process that will get regulatory review to the one that will not.

33. The misrepresentation of SWBT's true performance that this would cause would be significant. For example, for January, all but XX of AT&T's orders were earmarked for FDT rather than for CHC processing. Thus, the reconciled AT&T outage data for CHC alone account

[18] Any rationalization for why regulators should disregard a substantial aspect of a BOC's performance during the relevant period should meet with great skepticism. That is particularly true where, as here, the explanation was developed post hoc to explain poor results. Such explanations are all too easy to manufacture. For example, if CLECs had not followed SWBT's recommendation to use FDT and, as a result, had received poor CHC provisioning due to the capacity constraints that SWBT previously warned CLECs about, SWBT no doubt would now be claiming that those CHC results should be disregarded because the CLECs failed to follow SWBT's recommendation that they use FDT. Yet because CLECs did switch to FDT, SWBT feels free to claim that CHC is the only process that should really count.

for only two months, rather than three months, of SWBT's hot-cut provisioning performance. To exclude FDT provisioning, therefore, not only removes the lion's share of AT&T's hot cut orders from review, but leaves unreviewed an entire month of SWBT's performance.[19]

34. Finally, the TPUC claims (p.14) that to evaluate SWBT's FDT performance "will discourage other RBOCs from developing new systems or processes, even if such systems or processes may ultimately be more efficient, just before or during the pendancy of their 271 applications." Although it is in everyone's interest, including CLECs', not to remove whatever incentive the RBOCs may have to develop more efficient processes, the TPUC's concerns in this instance are wholly misplaced. SWBT did not present FDT – either to regulators or, more importantly, to CLECs – as merely an experimental process to be used only on a trial basis until SWBT could work out the bugs. Had it done so, then CLECs would have kept their FDT volumes very small, as AT&T did last August. Instead, SWBT planned from the outset to offer FDT as the principal method for provisioning most CLEC orders, encouraged CLECs to use FDT rather than CHC, and created a financial incentive to do so, and represented to regulators and CLECs alike that it was ready, willing and able to handle FDT orders. Far from discouraging innovation, to overlook SWBT's poor FDT performance in these circumstances would discourage the accountability and follow-through that is crucial to making local competition a reality; it would signal to RBOCs that they need not take steps that are essential to ensure that the processes that they themselves put forward for complying with their 271 obligations actually provide CLECs with nondiscriminatory performance. Indeed, for regulators

[19] The TPUC says (p. 14) it is not satisfied that the performance measurements and benchmarks it set for CHC should be employed without change for FDT. But a professed need for modifications to the old measurements does not excuse the TPUC's decision to overlook the reconciled outage data for FDT orders. That data is available now, and it measures SWBT's outage performance in a manner that permits a direct comparison to Bell Atlantic. The fact that other performance measurements may or may not be ideally suited to FDT is simply irrelevant to this fact.

to condone what amounts to a bait-and-switch on SWBT's part would, in our view, set a very dangerous precedent that would encourage ILECs to seek ways to game the system rather than to fulfill their duties and their promises to provide nondiscriminatory access.

35. We therefore see no basis for excluding SWBT's FDT performance from consideration. As we showed in our initial Supplemental Declaration, SWBT's FDT provisioning has been very poor. Indeed, even the TPUC cannot defend it as in compliance with the Commission's standards, even when subject to SWBT's manipulations. See TPUC Evaluation, p.21. In short, because SWBT's provisioning was plainly discriminatory for the process that it recommends and that CLECs—at SWBT's urging—principally used during the relevant time period, SWBT should not be found to have fully implemented the competitive checklist.

2. Even on CHC Outages Alone, SWBT Fails To Meet the BA-NY Order Standard

36. The foregoing demonstrates that there is no sound basis for excluding SWBT's poor FDT performance from an evaluation of SWBT's provision of hot cuts. Nevertheless, as AT&T demonstrated in its comments, the reconciliation shows that, even when CHC is considered apart from FDT, SWBT failed to demonstrate that it could provision hot cuts with the same level of outages that was deemed minimally acceptable in the BA-NY Order. Specifically, AT&T pointed out that the reconciled data show that SWBT caused outages on 11.1% of AT&T's CHC orders during the December to February period. DeYoung/Van de Water Supp. Decl. ¶ 20.

37. The TPUC, however, surprisingly reports that the same AT&T/SWBT reconciled data show a three-month outage rate of only 1.68% on CHC cutovers. See TPUC Comments on

page 17. Because both commenters purport to use the same data source, it is important to explain the different result.

38. AT&T's reported 11.1% outage rate for CHC orders reflects the use of the same methodology that the NYPSC and FCC used to calculate Bell Atlantic's outage percentage, as applied to data that AT&T and SWBT mutually agreed to. Specifically, it measures outages on the basis of orders, not lines, and it includes outages due to premature disconnects as well as those due to defective cuts. See BA-NY Order, ¶¶301 n.959, 309.[20]

39. In contrast, the TPUC's 1.68% figure for outages does not follow the Bell Atlantic methodology. The TPUC derives its percentage from the CHC data only by (1) excluding numerous outages that resulted from a "premature disconnect" or early cutover, of AT&T's customer's lines; (2) reporting the percentage as a function of the number of lines, rather than orders; and (3) excluding numerous outages caused by the RCMAC/SOAC software error in February.

40. As discussed below, these three "refinements" (SWBT 4/25 ex parte at 2) are each inconsistent with the BA-NY Order and none is justified by any facts unique to Texas. But at the outset, it is worth emphasizing that the TPUC does not disagree that, if calculated according to the Bell Atlantic methodology, SWBT's outage rate for CHC orders is 11.1%. Thus, the TPUC's disagreement with AT&T's reported results goes not to the data, but to questions of methodology. Indeed, the TPUC expressly acknowledges (p.17) that "[b]ecause SWBT and

[20] The PPIG data show the outage rate per order on a monthly basis. To calculate the average outage rate for the three month December-February period combined, it is necessary to sum the number of orders on which there was an outage each month (shown on the monthly summary sheet for CHC in parenthesis after the outage percentage) and divide by the three-month total number of orders (shown on the bucket chart for CHC that follows the summary). See DeYoung/Van de Water Supp. Decl., ¶20 and Attach. C. Thus, the reconciled data shows that SWBT caused XXX outages on XXX orders in December, XXX outages on XXX orders in January, and XXX outages on XXX orders in February, for a total of XXX outages on XXX orders and an outage rate of 11.1%. Id.

AT&T have reconciled their underlying data, however, all interested parties are given the opportunity to review the data and draw relevant conclusions from that data." This observation confirms that the TPUC's comments do not reflect the application of its expertise; rather than finding the facts and resolving disputes, as the NYPSC did, the TPUC is merely commenting on the facts sets forth by others, which – as it acknowledges – any interested party is free to do.[21]

41. As discussed below, none of the three refinements – each of which represents a departure from prior analysis -- has merit.

a. Exclusion of premature disconnects

42. The TPUC states – without explanation – that the "Texas Commission staff asked SWBT to provide outage data that would not overlap with the data or misses included in PMs 114, 114.1, and 115. The following chart, therefore, does not contain *outages* that result from premature disconnects; those outages are contained in PM 114." TPUC Evaluation, p.17 (emphasis added). Note that even the TPUC refers to the consequences of a premature disconnect as an "outage." Its decision to exclude outages that result from premature disconnects from the calculation of outages is unexplained and inexplicable.

43. To begin with, an outage caused by a premature disconnect (or "early cut") is an outage in every sense. From a customer's perspective, what matters is the fact of the unexpected loss of service – not its cause. And prematurely disconnecting a customer's lines causes a service disruption just as surely as misattaching the wires. It is thus crucial to consider the outages that SWBT causes by premature disconnects in calculating an overall outage rate.

[21] The TPUC never expressly mentions the outage rates as they appear on the face of the reconciliation reports, and never discusses the direct comparison between SWBT's and Bell Atlantic's outage performance that the reconciled data, without "refinement," allow the reader to make. Instead, the TPUC discusses the reconciled data only in terms of what the data show after the "refinements" are made, and provides no comparison with Bell Atlantic and no claim that SWBT's performance is equally good. The TPUC never explains this omission.

Indeed, that is precisely what the FCC did in calculating Bell Atlantic's outage rate. See BA-NY Order ¶ 301 n.959 (explaining that "outages can occur in two situations," namely "an early cut" and "a defective cut.").

44. The TPUC identifies no facts, much less facts unique to Texas, that warrant the exclusion of outages caused by premature disconnects. To the extent the TPUC's concern was one of "double counting" premature disconnects for both outages and on-time percentage, that concern is misplaced in light of the BA-NY Order. Indeed, as the FCC expressly noted, a premature disconnect was captured as *both* an outage and a "miss" in on-time performance in assessing Bell Atlantic's performance. See, e.g., BA-NY Order ¶ 301 n.959 ("Such an occurrence [an early cut] would be scored as a 'miss' under the Percent On-Time Hot Cut Performance measure *and would also result in an outage*") (emphasis added); Rubino Aff. ¶ 13 & Exs. 5, 6 (showing "early cuts" were included as outages in the NYPSC staff reconciliation).

45. There is thus no reason, in logic or precedent, to claim to be measuring "outages" generally as the TPUC does, and then to exclude those outages due to early cuts. Indeed, by presenting a chart (see p. 17) entitled "AT&T/SWBT Reconciled PPIG Outages" and then excluding those outages caused by early cuts, the TPUC has created a chart that is does not present the whole picture; AT&T does not agree that those percentages reflect the reconciled PPIG outages for those months. Although the text acknowledges that the early-cut outages were backed out, the table does not, thus forcing the reader to read into the table all of the caveats discussed elsewhere in the TPUC's comments.[22]

[22] The table also does not acknowledge that it is excluding the SOAC-error outages for February, nor does it acknowledge that it is reporting only on a lines basis; although these "refinements" can be deduced from the text and from looking at the April 25, 2000 ex parte that is the TPUC's source, they are not referred to in the table's caption or in any footnotes to the table.

46. It is also important to note that the TPUC purports – but fails in reality – to correct the misimpression left by its exclusion of outages due to premature disconnects. Thus, the TPUC acknowledges, after presenting its outages chart on p.17, that "AT&T asserts that premature disconnects must be part of any outage analysis"; the TPUC purportedly then goes on to "consider[] the outage data together with the premature disconnect data." Id. p. 18.

47. In reality, however, the TPUC never does consider the two sets of data "together." Most notably, the TPUC never discusses the results for the reconciled AT&T/SWBT data when premature disconnects are included. Having "backed out" the premature disconnects from the reconciled AT&T/SWBT data, the simple and obvious next step would have been to put those data on premature disconnects back in, and discuss the reconciled results just as they were originally reported by SWBT's and AT&T's representatives. But the TPUC never does so. As a result, it avoids all mention of the total outage results for CHCs, even on a line basis, that SWBT and AT&T jointly attested to for AT&T's orders. That reconciled data shows an outage rate of 11.1 percent for CHC orders and 8.2 percent for CHC lines.

48. Instead, the TPUC shifts gears to address (p. 18) not the reconciled AT&T data, but data for "all CLECs" on premature disconnects, as reflected in newly reported results under PM 114. This is inadequate as a substitute for a discussion of the reconciled SWBT/AT&T data on all outages, for three reasons.

49. First, by addressing the data on premature disconnects separately from the data on outages due to defective cuts, the TPUC avoids giving a composite number for all outages. That is significant, because only a number that reflects all kinds of outages can be meaningfully compared to the 4.5 percent outage rate that Bell Atlantic was found to have achieved on all outages combined. The TPUC's segregated analysis implies that SWBT's performance meets

the FCC's standard so long as outages due to defective cuts alone and outages due to premature disconnects alone are each less than 5 %; the FCC found, by contrast, that Bell Atlantic's outages from all sources *combined* were less than 5%.

50. Second, by addressing only the "all-CLEC" data on premature disconnects rather than the reconciled AT&T/SWBT data, the TPUC makes it impossible for the reader to derive the composite total outage figure for both premature disconnects and defective cuts. Notably, because SWBT does not track defective cuts for all CLECs, there is no "all CLEC" data on defective cuts that could be combined with all-CLEC data on premature disconnects to provide a single number for all outages. The decision to "shift gears" to the all-CLEC data on premature disconnects is arbitrary for that reason alone.

51. Third, the all-CLEC data on premature disconnects cannot fairly be substituted for the AT&T reconciled data on premature disconnects because the all-CLEC data is largely unreconciled, and therefore likely understates the number of premature disconnects. The AT&T/SWBT reconciliation shows that SWBT materially understates the number of premature disconnects that it reported on all AT&T's hot cut orders. See DeYoung/Van De Water Supp. Aff., ¶ 86.

52. The TPUC does not acknowledge this underreporting, and does not attempt to adjust the rate of premature disconnects to take account of the likely reality that SWBT has similarly underreported the number of premature disconnects for the rest of the industry. Indeed, Nextlink has reported that its reconciliation with SWBT similarly revealed significant under-reporting of premature disconnects by SWBT. See Comments of ALTS and the CLEC Coalition at pp. 3-5 and Attachment 2 thereto (Krabill Affidavit).

53. It is precisely to overcome the problem of under-reporting that regulators should look to reconciled data in the first place. Yet, the TPUC has offered no reason to think that SWBT's under-reporting is unique to AT&T and Nextlink. Indeed, the evidence concerning the root cause of this under-reporting shows that it is not CLEC-specific, but is due to deficiencies in SWBT's internal data collection and reporting processes that are common to all CLECs. See DeYoung/Van de Water Supp. Decl., ¶¶79-84. Indeed, as discussed further below, SWBT's responses to AT&T's "action list" of improvements in data collection and reporting tacitly concede the need for improvement. See, infra, Section II.A. For this reason, SWBT's self-reported data on early cuts (PM 114) must be presumed to under-report the actual incidence of premature disconnect outages.[23]

54. Thus, the first methodological departure on outages is that the TPUC backs out the outages due to premature disconnects, offers no valid reason for doing so, and then gives the impression that it has put the premature disconnects back into the analysis when, in reality, it has not done so.

b. The SOAC/RCMAC Problem

55. The third step that the TPUC took to reach an outage rate of 1.68 percent for CHC cutovers was to exclude the outages on the XX orders/XX lines that resulted in February from a software problem in SWBT's systems. The TPUC exaggerates the impact of this exclusion by reporting the results in terms of lines, rather than orders; as AT&T has previously shown, excluding the SOAC/RCMAC outages alone does not bring SWBT's performance for CHC or FDT into compliance when SWBT's performance is measured by orders. DeYoung/Van de

[23] Indeed, the TPUC further obscures the problem by reporting only the all-CLEC PM 114 data, rather than separately breaking out the reconciled-CLEC data separately, as it did for PM 114.1. Had it done so, the breakout for reconciled CLEC data alone likely would show a significant difference in the rate of early disconnects.

Water Supp. Aff. ¶ 23 & n.8. Nevertheless, any exclusion of these SOAC/RCMAC outages, whether by lines or orders, is inappropriate.

56. The TPUC relied on new, then unreconciled March data (p.18) to show that SWBT has repaired the particular systems problem that caused these outages. Even if this particular problem did not recur in March, however, that fact alone would be insufficient to relieve SWBT from responsibility for causing these outages in February. The crucial issue for purposes of section 271 is not merely whether a particular systems problem has been fixed, but whether the BOC has shown that its systems and performance have stabilized and can be depended upon to support broad-based, meaningful competition.

57. A BOC applicant can always claim that it had "fixed" whatever problem had led to the discriminatory performance that immediately preceded its application. That is why, to show nondiscriminatory performance, SWBT needs to demonstrate that it can provide non-discriminatory access, free of any such systems errors, for at least three consecutive months. From that perspective, the SOAC/RCMAC breakdown is important not as one-time technical problem, but as an illustration of a corporate culture at SWBT that is insensitive to its 271 obligations.[24]

58. For example, throughout this application process, SWBT has repeatedly tried to explain away violations of its duty to provide CLECs with nondiscriminatory access to SWBT's unbundled network elements by asserting that no "systemic" problem has been identified. See, e.g., Dysart Aff. ¶¶ 146, 281, 304, 351, 358, 389 (examples of "no systemic problem" conclusion); ¶ 331 ("results are expected to improve"); ¶ 410 ("no reason to expect this measure

[24] AT&T is not alone in its frustration with SWBT's failure to institutionalize a concern for its 271 obligations. As NEXTLINK has complained, "SWBT continues to promote an internal corporate policy designed to prevent normal interaction between our companies on certain key business matters. . . ." See Krabill Aff., ¶16; see also id. at ¶¶11-13.

to be out of parity in the future"); see also Pfau/DeYoung Decl., ¶74. While SWBT can and should fix these problems as they arise, the fact that they continue to recur month after month shows that SWBT has not yet established stable and reliable systems, training, and change management procedures such that it can consistently deliver parity or benchmark performance. See Pfau/DeYoung Aff., ¶93-94, 95; see also Attachment 1 of Reply Affidavit of C. Michael Pfau.

59. It is particularly important to require SWBT to demonstrate sustained compliant performance for UNE-L. While the RCMAC/SOAC problem may have been a one-time systems problem limited to February, SWBT's hot cut performance continues to be plagued by *other* problems that SWBT will also claim are one-time occurrences.

60. One recent example involves SWBT's failure to notify CLECs of SWBT's change from the ALI to ALISA 911 database. As set forth below, this was done not only without notice to CLECs, but without any advanced planning to minimize the impact on CLECs. As a result, AT&T's entry into the XXX market was delayed XXX weeks and entry into the XXX market was delayed for XXX weeks.

61. In late March or early April, AT&T was attempting to install two new switches – one in XXX and one in XXX . When AT&T placed orders for trunks for these switches, however, SWBT responded that it would not activate the trunks groups after installation until the switches had been 911-certified. This was the first time that AT&T – which had previously installed other switches in Texas – became aware of such a policy (which, to the best of AT&T's knowledge, SWBT has never included in its documentation). SWBT's position put AT&T in a "Catch-22" situation, because AT&T could not certify the switch until it passed 911 tests, but AT&T could not initiate 911 tests without passing 911 calls over the trunks. Only after AT&T

escalated the issue did SWBT agree to turn up one trunk for each switch, to make certification of the switches possible.[25]

62. It is unclear at this point whether SWBT's policy applies only to the XXX and XXX switches in question. Although SWBT orally promised to turn up one trunk for any switch that AT&T wished to install in the future, SWBT has not put that commitment in writing.

63. AT&T has encountered additional barriers in trying to provision 911 services in XXX and XXX . First, SWBT – without prior notice to AT&T – changed the database for end-user location information to be sent to the Public Safety Administration Point (PSAP). AT&T learned of this change only after it had loaded customer information into the preexisting database (ALI), its codes did not work in testing, and SWBT's systems nonetheless advised AT&T that no trouble had been found. After additional prodding, SWBT advised AT&T of the change in databases. SWBT stated that, due to the change, AT&T would be required to delete its records from ALI and re-load them into ALISA, the new database. The ensuing deletion and re-loading was a time-consuming process that caused delay, both in the certification of the switches and in AT&T's market entry.

64. Second, SWBT failed to inform AT&T that SWBT had been replaced as the database vendor for one of the suburbs that will be served by AT&T's XXX switch – XXXXXXX . AT&T learned of this fact only after it continued to fail 911 testing procedures to locations in XXXXXXXX because the PSAP was unable to view the data for those locations,

[25] Additional obstacles to competition erected by SWBT pertaining to 911 services in Texas are described in the comments filed by MCI WorldCom and Global Crossing on SWBT's first Section 271 application for Texas. *See* MCI WorldCom Comments, filed January 31, 2000, at 62-63 and Tab F (Emergency Petition of Advisory Commission on State Emergency Communications ("ACSEC") for Declaratory Ruling, Texas PUC Docket No. 20334, filed Jan. 15, 1999), Tab G (ACSEC List of Issues, Texas PUC Docket No. 20856, filed Aug. 25, 1999), and Tab H (SCC List of Issues, Texas PUC Docket No. 20856, filed Aug. 10, 1999); Global Crossing Comments, filed January 28, 2000, at 2-3, 4-5, and Larson Aff., ¶¶ 8-10.

even though AT&T was passing such data through the XXXXXX switch to the PSAP. Only after AT&T issued multiple trouble tickets to SWBT did SWBT finally advise AT&T that it no longer provided 911 database services for XXX XXXXXXX. In addition, AT&T encountered a classic runaround in its attempts to correct the problem and re-load the data. AT&T was advised by SWBT to contact the new vendor and conduct testing with that vendor – only to be told by the new vendor that AT&T should contact SWBT because the transition was to occur the following week. Only when AT&T again contacted SWBT did SWBT finally agree to load the information.

65. In the case of both the XXX and XXXXX switches, SWBT has also failed to perform in a timely manner the "action items" that must be implemented to ensure that its systems will recognize AT&T's codes, and that calls will be routed over the PSAP. Instead, SWBT has taken an inordinately long time to complete them. For example, when AT&T encountered problems with the ALI database in the XXX switch (as a result of SWBT's unannounced change to the ALISA database), SWBT did not proactively attempt to resolve the same problems in AT&T's Austin switch, even though SWBT was aware that AT&T was activating both switches. Prompt action was particularly necessary because the XXXX switch was a different type of switch (Nortel DMS) from the XXX switch (Lucent 5ESS), and therefore presented a far different set of circumstances – as SWBT probably knew, since it uses Nortel DMS switches in its own network.

66. Instead, SWBT did not begin to address the ALI/ALISA problems in connection with the XXX switch until AT&T actually encountered the problems in that switch. SWBT then advised AT&T that it could not develop an action plan until the third-party vendor (Lucent Technologies) first confirmed the steps that were necessary to correct the problem. SWBT then

took at least four business days to develop an action plan. This process was unreasonably lengthy, particularly since it seems unlikely that Lucent – which created ALISA – needed four business days to provide the confirmation which SWBT purportedly required.

67. While both the XXX and XXX switches have been certified, the certification process was extraordinarily lengthy. As a result of SWBT's initial failure to activate trunks for these switches, and SWBT's failure to advise AT&T of the change in databases and the change in vendor, AT&T's market entry has been delayed by XXX weeks in XXX , and by XXX weeks in XXX .

68. Even with the certification of the XXX switch, many of the problems that AT&T has encountered are likely to continue as AT&T attempts to install additional switches in Texas. For example, SWBT has failed to establish a process for advising CLECs of a change in the applicable database or database vendor – making it impossible for the CLECs to ensure a smooth transition.

69. It may be that SWBT's failure to anticipate the impact of CLECs of changing 911 databases, like SWBT's failure to anticipate the impact on CLECs of its RCMAC/SOAC systems upgrade, will not recur. Indeed, we fully expect that SWBT will promise to never forget to inform CLECs of a change in 911 databases again. But for 271 purposes, these promises should be deemed beside the point. We believe SWBT needs prove to CLECs and to regulators that it can deal proactively with the system changes that are inevitable in such a way as to deliver, consistently, nondiscriminatory performance. It has not done so.

70. Another reason not to overlook the RCMAC/SOAC-caused outages is that AT&T's most recent data, for FDT orders in early May, shows that SWBT's outage rate has spiked up yet again. For example, on May 2, 2000, SWBT caused outages on X of the XX FDT

orders it provisioned for AT&T, for an outage rate of 41.7 percent. We hasten to note that we have not yet had an opportunity to reconcile our May outage data with SWBT, so these results are preliminary only. But based on our experience over the last nine months, we are confident that the final reconciled numbers will show a significant jump in outages. The cause for this is unknown at this time. But even if the cause turns out to be yet another "one-time" systems or training problem that SWBT agrees to fix, our fundamental point will remain: there is simply no basis, at this stage, to excuse any SWBT-caused outages from the calculation of SWBT's outage rate.

71. Indeed, SWBT's May performance is demonstrating quite well how problems that were supposedly resolved nevertheless continue to recur. Despite serious performance problems on FDT in May, simply moving back to CHC is also not viable given demonstrated capacity constraints. In May, SWBT once again began issuing improper rejections of AT&T's CHC orders when SWBT is unable to confirm the specific hot cut due date and time AT&T requested, notwithstanding the fact that AT&T has been requesting the standard interval. Under such circumstances, SWBT is not supposed to reject the order, but rather assign the next available frame time. SWBT had gotten into the practice of issuing such improper rejections last year, but promised to stop the practice after AT&T's complaints. See UNE-Loop Decl., ¶45 and nn. 28-31; see also June 30, 1999 Letter from Ms. De Young to Mr. Young, SWBT's Executive Director, AT&T Account Team (Attachment 10 hereto) and July 6, 1999 Letter from SWBT's Mr. Hughes to Ms. DeYoung (Attachment 11 hereto). When SWBT does this, it benefits, of course, by not having the failure to meet the requested time count against it in the Performance Measures, which is why such rejections are so improper. Furthermore, the very fact that SWBT is unable to meet the requested due dates is direct evidence of the palpable capacity constraints